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Robert Wrener

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POLITICAL DEBATES ON PUBLIC TELEVISION: THE FORBES CASE

by

Robert Wiener*

I. Introduction

Televised political debates, especially in races for higher office, are common in the United States. Debates are not constitutionally required,¹ but voters expect to see candidates tested against each other.² Technology has changed the way political campaigns are conducted with television playing an ever more important role. If a televised debate takes place, who has a right to participate? If a private television station or organization³ sponsors the debate, it is governed only by legislation.⁴ However, if the debate is sponsored by a public television station, the United States Constitution, specifically the freedom of speech clause of the First Amendment, may apply.⁵ The case of *Arkansas Educational Television Commission v. Ralph P. Forbes* confronts this issue.

II. The Story

Ralph Forbes, a self-proclaimed Christian Supremacist, member of the American Nazi Party, and apeaker at Klan rallies, collected the signatures of more than 2,000 voters from an Arkansas congressional district in 1992.⁶ He thereby qualified to be on the ballot for his run as an independent candidate for a seat in the House of Representatives as an independent candidate. The five-station Arkansas Educational Television Network (AETN), owned by the Arkansas Educational Television Commission (AETC), sponsored a series of one-hour candidates debates, but only invited the Democratic and Republican candidates to participate. Forbes asked to be included, but was refused.⁷ AETC based its decisions on its judgment that he was not a "viable" candidate or "newsworthy".⁸ Forbes sued the AETC, but the District Court Decided against him⁹ and he did not participate in the debate.

In the election, Forbes won 2.5 percent of the vote. The winning margin was 3 percent.¹⁰ Forbes appealed the District Court decision and, in August 1996, the Court of Appeals for the Eighth Circuit found for Forbes on First Amendment grounds.¹¹ The United States Supreme Court decided the case in 1998.¹²

II. Freedom of Speech

The United States Constitution governs when state action is involved.¹³ A public television station is a state actor, so the constitution applies here. Forbes and the AETC argued the case on First Amendment grounds.

Several freedom of speech issues are raised by this case. Why protect speech? Is freedom of speech absolute? If not, how much legal protection does free speech get? Is all speech treated alike or are some kinds of speech entitled to greater protection? If so, how much?

Concerning political debates, do all candidates for political office have a legal right to be included in all political debates for that office? What if the candidate has qualified to be on the ballot? Are only the two major parties entitled to debate? Do the politics of the candidates matter? Do the preliminary polls, that is, the projected support at election time matter? Does money raised by a candidate matter? If minority candidates are kept out of debates does that constitute unconstitutional censorship? If a candidate's viewpoints are considered reprehensible do they have less of a right to speak? What if a third party candidate is ahead in the polls of one of the two major party candidates?¹⁴ Does the forum matter, that is, if the debate is in print, radio, television, or the Internet?

Does the issue of political debates on public television also concern freedom of the press? The freedom of speech clause of the First Amendment states that "Congress shall make no law ... abridging the freedom of speech..."¹⁵ But the First Amendment also has a freedom of the press component, "Congress shall make no law ... abridging the freedom ... of the press..."¹⁶ Does the press have a protected freedom to hold debates between candidates of its choice? Is that freedom more restricted if the press is public? Is television "the press"? If there a conflict between the candidate's freedom of speech and the press's freedom of the press¹⁷ how is it resolved? These are questions that the Supreme Court chose not to discuss. Rather, it spoke exclusively in freedom of speech terms, both for the candidate and the public television station.

III. First Amendment Theory

To better understand this case, it is helpful to first consider the philosophy and history of the First Amendment.

A. Absolutist vs. Codified English Law

The freedom of speech clause of the First Amendment reads "Congress shall make no law ... abridging the freedom of speech..."¹⁸ On the face of it, it is unambiguous. Some have suggested that its appropriate reading is absolutist, that Congress shall make no such law. This interpretation would forbid any governmental restriction on speech. Then what of the passing of government military secrets to an

* Associate Professor of Legal Studies, Lubin School of Business, Pace University

enemy?¹⁹ Or the use of the words of another without permission?²⁰ And is this clause limited congressional acts or is it extended to other legislative bodies and the executive and judicial branches? What of common law actions for defamation? Or shouting "Fire!" falsely in a crowded theater?²¹ An absolutist reading would have results both too broad in terms of the speech allowed and too narrow in terms of the political institutions covered.

An alternative reading is to understand the First Amendment as a codification of the English law of its time of the First Amendment.²² If so, only previous restraints by the government would be prohibited.²³ However, the Supreme Court has decided that post-publication penalties are banned by the First Amendment.²⁴

B. Why Protect Speech?

As is true of its companion amendments in the Bill of Rights, the open texture of the words of the First Amendment lends itself to interpretation. Although the point is still debated, the prevailing jurisprudence of constitutional interpretation applauds the opportunity for the Constitution to develop over time,²⁵ rather than being restricted to the original intent of its authors.²⁶

Therefore, to determine the meaning of the First Amendment, courts have asked the question, "Why protect speech?" What is the objective of freedom of speech? If we know our objective, they suggest, we will better know how to get there. In recent cases, courts have considered two theories.

Under the instrumental theory presented by Alexander Meiklejohn, government restriction of speech is seen as interference with the free flow of information preventing the public from making informed democratic choices.²⁷ This interpretation focuses on the listener's right to listen. This is the theory reflected in the opinions of Justices Holmes and Brandeis promoting a free market in ideas. As the court stated it more recently, "It is of particular importance that candidates have the opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."²⁸

The dignitary theory advanced by Tom Emerson considers self-expression to be an essential component of human dignity.²⁹ This theory focuses on the speaker's right to speak, that is, on the speaker's freedom of speech, rather than the listener's freedom to listen.

The instrumental theory is the more commonly used approach in First Amendment cases, but little is made of traditional freedom of speech theory in the *Forbes* case. The dignitary theory is not directly discussed and neither the majority nor the dissent consider *Forbes's* right to speak. There is some concern in the dissent as to *Forbes's* right to speak compared to other candidates who are permitted to participate in debates. But this is a relative right to speak rather than a constitutional freedom of

speech. The instrumental theory seems to underlie Justice Stevens's concern in "government censorship and propaganda."³⁰

IV. Freedom of Speech Cases

A. Holmes-Brandeis

A Supreme Court approach to interpretation and application of the freedom of speech clause has developed in a series of opinions by Holmes and Brandeis. This line of analysis began as dissenting opinions in the 1920s and was later adopted by the Supreme Court.³¹ It is premised on the understanding that freedom of speech is not absolute, but may be restricted by the government. However, government may not censor political speech merely because it disagrees with a speaker's viewpoint.³² This is capitalist economic theory applied to constitutional political theory – Holmes's notion of "free trade in ideas."³³

Government may restrict the content of speech, but only if it has a high interest in the speech.³⁴ This state interest must be compelling. For the state to act on its compelling interest there must also be an extremely close causal connection between the speech and the anticipated harm³⁵ such that state action is necessary. Even then, that state action must be drawn as narrowly as possible, the least restrictive alternative, so as not to restrict permitted speech. In other words, government censorship is not constitutional if a less limiting action is possible. This judicial content based analysis of abridging of freedom of speech by a court is called strict scrutiny.³⁶

B. Content Analysis

The Supreme Court has made a distinction between content-based and content-neutral governmental restrictions on freedom of speech. If the content of governmental regulations of the time, place, manner of speech is neutral, for example parade permit statutes,³⁷ it will receive a somewhat more relaxed scrutiny.³⁸

Applying First Amendment content analysis to *Turner Broadcasting television case*,³⁹ the Supreme Court decided by a 5-4 majority that a content neutral regulation requiring cable companies to carry public television stations, "may treat categories of speakers differently without being labeled content-based as long as little risk exists that the regulation will be used to control what the speakers say."⁴⁰ The distinction between content neutral and content based regulations is crucial to the outcome of a case. Content based regulations are much more likely to be found unconstitutional.

C. Forum Classification

The Supreme Court has developed a hierarchy of protection of speech from governmental restrictions based on the nature of the forum. Those forums which are considered more traditionally open to public debate receive a higher degree of judicial scrutiny. Forum classification was adopted over the objections of Justice Brennan who

would have granted strict scrutiny protection from state action to all protected speech regardless of the forum.⁴¹

The Court classifies a forum, in order of decreasing constitutional speech protection, as (1) a traditional public forum, (2) a limited public forum, or (3) a non-public forum.

1. Traditional public forum

A traditional public forum is a place where the public would be traditionally welcome to speak. In a traditional public forum abridgment of speech is permitted only if it is necessary to serve a compelling state interest and if the restriction is narrowly drawn to achieve that end. This is a strict scrutiny test. Courts will scrutinize closely the governmental restriction of speech and declare it constitutional only if it meets this test. In other words, government officials have very limited discretion to restrain the expression of ideas in traditionally public forums.

Even so, if the strict scrutiny test is passed, the state may so act. In the case of *Davis v. Massachusetts*⁴² the United States Supreme Court followed a Massachusetts case opinion by Holmes.⁴³ A speaker on the Boston Commons was arrested for speaking without a permit. Holmes argued for absolute governmental power in this case. "[F]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."⁴⁴ In the past century, the judicial trend has been to increase the protection given to speakers. Since the *Davis* case, traditional public forum First Amendment protection has been provided to streets, parks, and other public places held by government.⁴⁵

2. Limited public forum

Limited public forum is a term applied to typically non-public places which serve as public forums for limited times or for selected classes of persons.⁴⁶ For those limited times or persons, courts apply the traditional public forum test.⁴⁷ At other times or for persons not within the selected class, they are treated as non-public forums. Limited public forums include the opening of university facilities to student groups⁴⁸ and a municipal theater made available for theater productions.⁴⁹

3. Non-public forum

A non-public forum is neither a traditional nor a limited public forum; that is, neither tradition nor designation makes it a forum for public communication.⁵⁰ Public property is not a public forum simply because it is governmental.⁵¹ An example of a non-public forum is a public school mail system even if made available to a community organization.⁵²

Speech in a non-public forum is still constitutionally protected, but to a much lesser degree. A rational basis or reasonableness test is used here under which the state may regulate speech as long as that regulation is reasonable and not merely content based censorship, an effort to suppress views opposed by public officials.⁵³ Judicial review in these cases is much more relaxed and courts typically defer to the state.

3. Application of Forum Classification

Forum designation is often outcome determinative. Governmental restrictions in traditional public forums are much more likely to be found unconstitutional than similar restrictions in non-traditional public forums. Once the forum is classified, the legal question is whether the appropriate standard has been properly applied.

V. Forbes Case

A. Choosing Up Sides

The Forbes case excited many to weigh in with *amicus curiae* briefs. The side choosing has resulted in some strange bedfellows. On the side of Ralph Forbes are the Greens/Green Party USA,⁵⁴ Perot '96,⁵⁵ Eugene McCarthy, the American Civil Liberties Union, and the Brennan Center for Justice.⁵⁶ The Rutherford Institute paid for Forbes's counsel.⁵⁷ On the side of AETC were the United States Justice Department, the Federal Communications Commission, the Commission on Presidential Debates,⁵⁸ the Corporation for Public Broadcasting, the Association of America's Public Television Stations, 20 states, and New York City.

B. Forum Classification

What is the appropriate forum classification for public television sponsored candidates' debates? The Eighth Circuit Court of Appeals in this case decided that it was a public forum.⁵⁹ The Eleventh Circuit, in a similar case, determined that, because it "was stated in order for candidates to express their views on campaign issues," it was "a limited-purpose public forum."⁶⁰ The Justice Department brief claimed that "Sponsorship by a state actor does not convert a news program into a public forum."⁶¹ Kelly Shackelford, Forbes's counsel, argued "If a government-sponsored and -planned debate is not a limited public forum, one can only wonder what is."⁶²

The Supreme Court recognized the important threshold nature of this question. "[I]t is instructive to ask whether public forum principles apply to the case at all."⁶³ The court began to discuss the public forum doctrine, but very shortly it was discussing the sui generis nature of journalism in general and television broadcasting in particular and became uninterested in forum classification. "In the case of television broadcasting, however, broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."⁶⁴ The court emphasized the need for

deferring to the editorial discretion of broadcasters without really considering the constitution.⁶⁵ This seems to be a case of begging the question. The majority engaged in scrutiny far less than strict before it had even determined the type of forum involved and, therefore, the appropriate level of scrutiny.

Not surprisingly, the court eventually decided that the political debate on public television was a non-public forum.⁶⁶ Once this forum classification was made the end was in sight.

The notion that television is not a traditional public forum seems to result from the adoption of a narrow definition of tradition. The public square or town hall may have been the traditional forum for political debate at the time of the drafting of the First Amendment and the Lincoln-Douglas debates.⁶⁷ But our political tradition evolves and many years have passed since the televised Kennedy-Nixon debates.⁶⁸ Today, I believe, we would much more expect a televised debate for a congressional seat than a non-broadcast debate in a "traditional" public space. If we don't grant the highest constitutional protection to political speech broadcast on our public airways through the auspices of a governmental agency, I fear for the protection of all speech.

The dissent took a step back from forum classification suggesting a more general issue, "whether AETC defined the contours of the debate forum with sufficient specificity to justify the exclusion of a ballot-qualified candidate."⁶⁹ Although the dissent seemed unhappy with forum analysis,⁷⁰ it did suggest that televised political debates are most like parade permits.⁷¹ That would seem to imply limited-public forum analysis as with Ward.⁷²

C. Public and Private Media

If it is all television, broadcast in the same way, why shouldn't public and private television be judged by the same standards?⁷³ Isn't this case best understood as one of applying journalistic standards⁷⁴ protected by the media's First Amendment freedom of speech?⁷⁵

The Eighth Circuit did make a distinction between private and public television. Constitutional protection is not available unless there is state action. "[A] crucial fact here is that the people making this judgment were not ordinary journalists: they were employees of the government. The First Amendment exists to protect individuals, not government."⁷⁶ "A journalist employed by the government is still a government employee."⁷⁷ And, as the *Forbes*'s brief argues, "if the broadcasters are state actors, the First Amendment precludes them from having unfettered journalistic discretion."⁷⁸

The Supreme Court largely ignored this distinction, treating all broadcasters, public and private, alike.⁷⁹ By blurring such a distinction, the Court ignored the primacy of the Constitution.⁸⁰ Apparently it feared the slippery slope argument of unbridled speech, for it seemed unable to distinguish debate between political candidates from other forms of speech.⁸¹

The dissent expressed concern protection of public television presented "the risk of government censorship and propaganda in a way that protection of privately owned broadcasters does not."⁸²

D. Speaker Selection

If speaker selection is restricted by the Constitution, what are the rules? How do public media decide who has a right to speak when?

1. Traditional Candidate Test

How important is our traditional two-party political system in this case? Should the candidates of the Democratic and Republican parties automatically participate in candidate debates and not others? After all, what chance do they have to win?⁸³ Or, as Perot '96 argued, is it true that "The whole point of a political campaign period is to allow candidates – through popular appeals, organizing, and debates – to change public opinion", not "self-perpetuating rule by Republicans and Democrats"?⁸⁴ The dissent found value in diversity of opinion quoting an earlier case that "political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream."⁸⁵

2. Good Faith Test

Good faith has played a role in other constitutional law cases.⁸⁶ Should we rely on the good faith of the editor to determine our freedom of speech? The Court of Appeals argued that the good faith of the AETC is not sufficient.⁸⁷ The question should not be one of faith, but of action.

3. Content-Based Test

Alternatively, should we use the Turner Broadcasting content-based test, that is, content-based selection is unconstitutional, but selection on other grounds may not be? AETC agrees that "viewpoint discrimination" is unconstitutional⁸⁸ and there was no smoking gun in evidence rejecting *Forbes* because of his views, but how do we distinguish between keeping candidates out of a debate and keeping minority views from being heard?⁸⁹ How do we know whether candidate selection for a debate is content-based? This standard seems far too vague for even the Supreme Court to consider.

4. Rational Basis Test

We are left with a rational basis test as our final alternative. But if a rational basis test is used, on what basis can a rational decision be made? AETC's counsel argued for a test of whether a candidate was "newsworthy" enough to "best serve the interests of its

viewers."⁹⁰ The AETC also argued for the "political viability" test. But the AETC seems to have really used the traditional candidate approach because it staged entire debates between majority candidates even when the outcome of the election was hardly in doubt.⁹¹ Perhaps the majority parties should not be so sanguine about the results of this case for their candidate may not always be politically viable. The Court of Appeals argued that a decision in favor of Forbes is correct even if we assume the continuation of a predominantly two-party system. "If Mr. Forbes can be excluded today, a Republican or Democrat who is believed to have no chance of success could be excluded tomorrow."⁹² "Political viability is a tricky concept. We should leave it to the voters at the polls, and to the professional judgment of nongovernmental journalists."⁹³ Furthermore, the Eighth Circuit observed that Ralph Forbes had, in fact, earned a plurality of the votes in the 1990 Arkansas Republican primary for lieutenant governor.⁹⁴

The Eighth Circuit said that "The question of political viability is, indeed so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment."⁹⁵

Both the majority and the dissent in this case apparently felt that the rational basis/political viability test is the appropriate test. Where they differed, is in their analysis of the application of the test; that is, whether, in this case, an objective standard was used by AETC staff.⁹⁶ As characterized by Justice Stevens, the AETC decision was an "entirely subjective, ad hoc [judgment],"⁹⁷ whereas what was required was "narrow, objective, and definite standards."⁹⁸

E. Competing Freedom of Speech Claims

Another argument raised here against Forbes is that of competing freedom of speech claims. If one speaker gets more freedom of speech, another speaker necessarily gets less. And if there are too speakers no one has an opportunity to engage in meaningful speech. In other words, does granting freedom of speech to all deny freedom of speech to all?

AETC claimed that its decision to exclude Forbes resulted in more speech for the only candidates with a chance of winning.⁹⁹ As argued by its counsel, Richard Marks in his brief, "If every candidate had a constitutional right to appear in a debate on public television, then public broadcasters would be flooded with requests for access."¹⁰⁰ The result would be a "cacophony" and no voice would be clearly heard.

The Eighth Circuit did not absolutely protect the right of minority candidates to be heard, but it questioned the exclusion of a candidate on the grounds used.¹⁰¹ Forbes's counsel asserted that the "effect of AETC's approach is to exclude minority voices and viewpoints."¹⁰² It argued for many voices quoting Judge Learned Hand that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."¹⁰³

The Supreme Court, concerned at the number of candidates on some ballots, was persuaded by AETC argument, even adopting the "cacophony" argument.¹⁰⁴ In fact, the court took it even a step further presenting the specter of absolute silence if the public broadcaster chose that a debate wasn't worth the bother.¹⁰⁵

I believe that at best this is an example of an easy case making bad law. The perceived evil, too little speech for some, usually the majority candidates, gives more value to the speech of some candidates than other candidates. Perhaps unequal valuation of speech makes sense in some cases, to enable the voter to make a decision based on the speech of a limited number of candidates.¹⁰⁶ And I believe that the fear of dead air because of too many candidates is a bogey man. Even if this might happen in some case, this is not the feared hard case. There were only three candidates on the ballot for this office and televised debates of three candidates have been held for three presidential candidates¹⁰⁷ and for many more candidates in presidential primaries.¹⁰⁸

The court's concerns as to having too many speakers in a debate in which no one is really heard could be answered either by the dissent's argument that objective standards simply be established in advance of the selection of debate participants. In practice, this anticipated problem would probably be resolved through legislation making access to the ballot increasingly difficult. That raises its own constitutional issues, but they have apparently been resolved.

Such an interpretation would preserve principle that not everyone has access to public media.¹⁰⁹ It might also result in movement to further limit access to the ballot by increasing the signature requirements for candidacy on the ballot. But decisions on those potential cases will be left to another day.

Does the broadcaster have freedom of speech claims as well? The court asserted that "[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity"¹¹⁰ which apparently is seen as at least as deserving of First Amendment protection as the political speech of a candidates' debate.¹¹¹ The court's starting point is one of lack of access to the public press. "[I]n most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming."¹¹² Candidate debates are then presented as "the narrow exception to the rule" that "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine."¹¹³ At first it seems pretty innocuous – at least debates get some scrutiny. However, by putting debates in the category of the exception to the rule, Forbes had to play catch-up to prove his exceptional status, rather than having burden on AETC justify its limitation of speech.

The dissent also accepts broad journalistic discretion, just not quite as broad as the majority. Its primary concern is that here there is "nearly limitless discretion."¹¹⁴ It appears that just a little less discretion would have been fine.

The court, by finding freedom of speech claims for majority candidates and broadcasters denied freedom of speech to the only two parties who really needed it, Forbes and the voters.

F. Effects of Decision

What does the Supreme Court decision mean for political debates on public television?¹¹⁵ Perhaps it does mean that public television would be more likely to sponsor political debates.¹¹⁶ They'll certainly be able to ignore marginal candidates such as Forbes. They will avoid the fear that if the Court of Appeals ruling had been followed, it might have been extended to public television news programs.¹¹⁷ The concern of the Supreme Court seems to have been that to recognize a constitutionally protected right to freedom of speech by minority party candidates is to embark on a slippery slope that may have repercussions far beyond candidate debates.¹¹⁸

If the court had kept its eyes on the ball and decided the case before it on its merits, rather than being distracted by possible ramifications of its decision, it would have done a better job. A judicially acceptable selection standard could have been used to choose participating candidates. Or public television might restrict itself to covering "bona fide news events,"¹¹⁹ perhaps including broadcasts of privately sponsored political debates.¹²⁰

VI. Conclusion

The United States Supreme Court decision was not a foregone conclusion. As Justice Kennedy stated in his opinion, the court granted a *writ of certiorari* for this case, not only because of its constitutional and practical significance, but also because of a split in the Circuit Courts of Appeal. The Eleventh Circuit had decided for a public television commission, the Georgia Public Telecommunications Commission¹²¹ on similar facts.

This decision does danger to the fabric of constitutional law in general and the First Amendment in particular. As discussed above, it blurs the line between public and private action, as the dissent notes¹²² and cheapens the value of freedom of speech by deciding that everyone has it, but the more powerful just have more of it.

But the most disappointing aspect of this case is the dissenting opinion. Even if the dissenting opinion¹²³ had been adopted by the majority of the court, the impact of this case on constitutional law would not have been significantly different. The dissenters disagreed more on the application of the constitutional principles¹²⁴ than on what the basic appropriate principles are.¹²⁵ The result of this particular case would have been different, but the bar of constitutional judicial review would have been set only a little bit higher.¹²⁶

The dissent here accepts that the forum is non-public and apparently uses the weakest form of judicial review available in these cases, the rational basis test. Their question is more of whether the standards that would have been applied to a private

television station have been met, rather than whether the standards for public television stations governed by the United States Constitution should be stronger.¹²⁷

This shortcoming is most apparent in Justice Stevens's misquoting of the Court of Appeals opinion. Whereas Richard S. Arnold, Chief Judge of the Eighth Circuit, made a sweeping statement rejecting a "political viability" test as constitutional under the First Amendment,¹²⁸ Justice Stevens referred to the statement as referring only to "the staff's appraisal of 'political viability.'"¹²⁹ This misuse of Judge Arnold's opinion is the equivalent of plagiarism in that both involve false attributions. The distinction between Judge Arnold's words and Justice Stevens's words is crucial. It is the difference between testing each individual candidate who has qualified for a place on the election day ballot under the relevant legislation of the political unit for political viability and rejecting such a test completely. The dissent, sadly, opted for the case-by-case approach.¹³⁰

What is perhaps most strange is that, after this decision, federal legislation governing political debates sponsored by private broadcasters may well protect a minority candidate's freedom of speech better than the First Amendment. If this meant that speech is receiving super-constitutional rights by legislation, that would be one thing, but it seems to me that, instead, the protection afforded against governmental restrictions is weakening.

If I am right, then the tide of constitutional protection of freedom of speech has curiously turned, with the protection of commercial speech strengthening and the protection of political speech weakening. We must be careful not to primarily identify ourselves as a capitalist economy rather than a democratic republic.

As time passes, the wisdom of Justice Brennan becomes more and more clear. A simplification of the analysis of freedom of speech, strictly scrutinizing government censorship, would clarify rights and duties in a way that would preserve the importance of constitutional protection, especially of political speech, and avoid complicated forum classification followed by various forms of judicial review. But the Supreme Court seems determined to at least pay lip service to the perpetuation the forum categorization approach. In practice, it seems to have significantly limited those forums which may be labeled traditionally public, and thereby permitted further limitations on political speech.

The First Amendment is there to protect the freedom of speech of those whose freedom needs protecting. Candidates whose political viability is not in doubt need no protection. The media, public and private, will be eager to broadcast their words. It is the words of those whose voices are likely to otherwise go unheard that concern the constitution. Political debate is how ideas are tested. The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office."¹³¹ It is fundamental for democracy. To exclude minority candidates because they are minority candidates, is to silence the voices of those we are least likely to, and perhaps most need to, hear.

¹ "A state-owned broadcaster need not plan, sponsor, and conduct political debates" *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *42 (1998) (Stevens, J., dissenting).

² When debates do not take place, for example in the 1994 New York State gubernatorial election between Mario Cuomo and George Pataki, people notice. No debate occurred because the Democratic incumbent, Mario Cuomo, insisted on allowing all candidates to participate, while the Republican candidate, George Pataki, insisted on a one-on-one debate. "Well hell, maybe we can get the wives to debate. Our election campaign, already close and nasty, is now officially wallowing in foolishness and dreck. We have two candidates who are afraid to stand up in the same room and face each other. As a result, the first gubernatorial debate takes place upstate tonight, featuring Mario Cuomo and four complete strangers. The whole thing is being televised on C-Span, so the entire nation can witness our humiliation. Candidates in every other state in the nation have no problem getting together for debates, people. There are states where the gubernatorial candidates have already faced off four, six, 10 times." Gail Collins, *NEWSDAY*, Oct. 14, 1994.

³ Such as the League of Women Voters.

⁴ Debates for federal office are governed, for example, by 47 U.S.C. Section 315. Stations or networks must conform to the Federal Communication Commission's equal time provisions.

⁵ The Constitution is applicable to state and local public television through interpretation of the Fourteenth Amendment's due process clause. *U.S. CONST. Amend. XIV. West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁶ The Third District, President Clinton's district. Apparently, Ralph Forbes is running for the same seat again this year, 1998. Elizabeth McFarland and Doug Thompson, *Lincoln, Boozman about even in cash on hand*, *THE ARKANSAS DEMOCRAT-GAZETTE*, July 16, 1998, at ?.

⁷ There was a debate on 22 October 1992 for the House of Representatives seat for which Forbes was a candidate.

⁸ AETC decisions were made by its executive director, Susan Howarth, whose editorial judgment is statutorily independent from AETC's eight commissioners appointed by the governor of Arkansas.

⁹ *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 500 (8th Cir. 1996).

¹⁰ The Republican, Tim Hutchinson, won over the Democrat, John Van Winkle.

¹¹ Opinion written by Chief Judge Richard Arnold for a three-judge panel. *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996).

¹² *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102 (1998).

¹³ *U.S. CONST. Amend. XIV.*

¹⁴ Note Ross Perot's presence and absence in the debates for the presidency in 1992.

¹⁵ *U.S. CONST. Amend. I.*

¹⁶ *U.S. CONST. Amend. I.*

¹⁷ Justice Stewart.

¹⁸ *U.S. CONST. Article I.*

¹⁹ *Treason. U.S. CONST. Article III, Section 3.*

²⁰ *Copyright. U.S. CONST. Article I, Section 8.*

²¹ Oliver Wendell Holmes, Jr.,

²² 1789.

²³ "[T]he liberty of the press ... consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published." 4 Blackstone's Commentaries, 151.

²⁴ "[T]he prohibition of laws abridging the freedom of speech is not confined to previous restraints." *Schenck v. United States*, 249 U.S. 47, 51 (1919).

²⁵ Ronald Dworkin.

²⁶ Robert Bork.

²⁷ Meikeljohn, Alexander, *Free Speech and Its Relationship to Self-Government* (1948). Meikeljohn has been described as "The leading exponent of free speech as an aid to informed decision-making." *Bentsen v. Coors Brewing Co.*, 512 U.S. 1203 (1994).

²⁸ *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). Note that by using the word "among" the Court anticipated more than two candidates.

²⁹ Emerson, Tom, *The System of Free Expression* (1970).

³⁰ "[D]eference to its [AETC's] interest in making ad hoc decisions about the political content of its programs necessarily increases the risk of government censorship and propaganda." *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *40 (1998) (Stevens, J., dissenting).

³¹ E.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Gitlow v. New York*, 268 U.S. 652 (1925); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³² Note that the Supreme Court has since recognized a degree of constitutional protection for commercial speech as well, but the government may certainly restrict certain speech (e.g., Federal Trade Commission actions against false and misleading advertising).

³³ Dissenting, in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

³⁴ Freedom of speech rights "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

³⁵ For example, Justice Holmes's "clear and present danger" test, *Schenck v. U.S.* 249 U.S. 47 (1919).

³⁶ *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³⁷ Sometimes parade cases turn on whether the parade sponsor is public or private (e.g., the New York City St. Patrick's Day Parade) because if the sponsor is private constitutional protections are not triggered..

³⁸ Here the court considers if the restriction of substantive content is neutral and narrowly-tailored to achieve a significant government interest leaving the speaker an adequate alternative. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

³⁹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

⁴⁰ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

⁴¹ Dissenting opinions in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974); *Greer v. Spock*, 424 U.S. (); *Jones v. , U.S. ()*.

⁴² *Davis v. Massachusetts*, 167 U.S. 43 (1897).

⁴³ *Massachusetts v. Davis*, 162 Mass. 510 (1895).

⁴⁴ *Massachusetts v. Davis*, 162 Mass. 510, (1895).

⁴⁵ *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939) (open air meeting).

⁴⁶ "A public forum may be created for a limited purpose such as use by certain groups...." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, n.7 (1983).

⁴⁷ *Widmar v. Vincent*, 454 U.S. 263 (1981); *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985).

⁴⁸ *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁴⁹ *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

⁵⁰ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

⁵¹ The "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

⁵² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

⁵³ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

⁵⁴ Ralph Nader's party.

⁵⁵ The H. Ross Perot campaign, although included in the Commission on Presidential Debates sponsored presidential and vice-presidential debates in 1992, was excluded from their debates in 1996. Court action was unsuccessful and Perot '96 complained with the Federal Election Commission (still pending as of 06 October 1997 according to the *Legal Times*).

⁵⁶ At the New York University School of Law.

⁵⁷ Also the financial supporter of the Paula Jones in here case against President Clinton.

⁵⁸ Privately run.

⁵⁹ *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996).

⁶⁰ *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d 486, (1990), cert. Denied, 502 U.S. 816 (1991).

⁴⁴ *Massachusetts v. Davis*, 162 Mass. 510, (1895).

⁴⁵ *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939) (open air meeting).

⁴⁶ "A public forum may be created for a limited purpose such as use by certain groups...." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, n.7 (1983).

⁴⁷ *Widmar v. Vincent*, 454 U.S. 263 (1981); *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985).

⁴⁸ *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁴⁹ *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

⁵⁰ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

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⁵² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

⁵³ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

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⁵⁶ At the New York University School of Law.

⁵⁷ Also the financial supporter of the Paula Jones in here case against President Clinton.

⁵⁸ Privately run.

⁵⁹ *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996).

⁶⁰ *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d 486, (1990), cert. Denied, 502 U.S. 816 (1991).

⁶¹ Justice Department brief, filed by then Acting Solicitor General Walter Dellinger (May 1997). Deputy Solicitor General Lawrence G. Wallace, on behalf of the Federal Communications Commission, also argued orally that this was not a public forum. Richard D. Marks's Supreme Court oral argument. *N.Y. TIMES*, 9 October 1997, at A28.

⁶² *Forbes* brief.

⁶³ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *12 (1998).

⁶⁴ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *12-13 (1998).

⁶⁵ "Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming." *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *13 (1998).

⁶⁶ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *19 (1998).

⁶⁷ *Abraham Lincoln vs. Stephen Douglas*, 1858 debates for Senator from Illinois. *THE COLUMBIA ENCYCLOPEDIA* 788 (Barbara A. Chernow & George A. Vallasi, 5th ed. 1993).

⁶⁸ *John Kennedy vs. Richard Nixon*, 1960 debates for President of the United States. *THE COLUMBIA ENCYCLOPEDIA* 1463 (Barbara A. Chernow & George A. Vallasi, 5th ed. 1993).

⁶⁹ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *41 (1998) (Stevens, J., dissenting).

⁷⁰ "The televised debate forum at issue in this case may not squarely fit within our public forum analysis." *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *46 (1998) (Stevens, J., dissenting).

⁷¹ Surely the Constitution demands at least as much from the Government when it takes action that necessarily impacts democratic elections as when local officials issue parade permits." *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *35 (1998) (Stevens, J., dissenting).

⁷² *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

⁷³ According to Judge Arnold, "We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople." *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996).

⁷⁴ The federal Communications Act requires all stations, public and private, to exercise independent news judgment as a license condition. N.Y. TIMES, 09 October 1997, at A28.

⁷⁵ Marks argued for Howarth's freedom in exercising editorial judgment. AETC brief.

⁷⁶ *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 505 (8th Cir. 1996). Part of this passage was quoted approvingly by the dissent, but it failed to follow the thought to its logical conclusion. In fact it almost immediately turned its attention to a private broadcasting case. *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *35 (1998) (Stevens, J., dissenting).

⁷⁷ *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996).

⁷⁸ *Forbes* brief.

⁷⁹ See n. above. The cases repeatedly cited as precedents involve private networks: the Columbia Broadcasting System in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) and the Turner Broadcasting System in *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

⁸⁰ "As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination." *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *13 (1998). This general rule referred is not a general constitutional rule. The rule seems to be a case of the Court taking notice of a general rule of journalism.

⁸¹ "Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others." *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *14 (1998). Here again, broadcasters, both public and non-public, are presented as the same.

⁸² *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *40 (1998) (Stevens, J., dissenting).

⁸³ A third party candidate has never won a presidential election and has only infrequently won a substantial percentage of the vote. But Forbes himself won the most votes for Lieutenant Governor of Arkansas in 1990 in the initial Republican primary and, "in 1958, in the Second Congressional District, a write-in candidate who equipped his supporters with stickers that could readily be applied to the ballot defeated the incumbent Democratic Member of Congress despite the fact that he began his campaign very shortly before the election." *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 505 (8th Cir. 1996).

⁸⁴ Perot '96 brief.

⁸⁵ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, * (1998) (Stevens, J., dissenting) quoting *Anderson v. Celebrezze*, 406 U.S. 780, 794 (1983).

⁸⁶ E.g., search and seizure cases under the Fourth Amendment.

⁸⁷ Judge Arnold wrote, "We also believe that the judgment in this case was made in good faith." *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, (8th Cir. 1996).

⁸⁸ Richard D. Marks's Supreme Court oral argument. N.Y. TIMES, 09 October 1997, at A28. Some of the *amicus curiae* briefs went further. "The First Amendment does not constrain the editorial choices of state-entity public broadcasters licensed to operate under the Communications Act." Brief for FCC et al. as Amici Curiae 14.

⁸⁹ "Why isn't that a pretty darn good way substitute for viewpoint discrimination?" Justice David H. Souter questioning Marks during oral arguments. Richard D. Marks's Supreme Court oral argument. N.Y. TIMES, 09 October 1997, at A28.

⁹⁰ Richard D. Marks's Supreme Court oral argument. N.Y. TIMES, 09 October 1997, at A28.

⁹¹ One of the major candidates included had even raised less money than Forbes. Dissent, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *34 (1998).

⁹² *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996).

⁹³ *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996).

⁹⁴ "It is worth noting that Mr. Forbes himself received the most votes in the preferential primary for the Republican nomination for lieutenant governor in 1990. (He was defeated in the run-off primary.) *Forbes*

v. Arkansas Educ. Television Comm'n, 93 F.3d 497 (8th Cir. 1996).

⁹⁵ *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996).

⁹⁶ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *35 (1998) (Stevens, J., dissenting).

⁹⁷ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *41 (1998) (Stevens, J., dissenting).

⁹⁸ *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969)

⁹⁹ Susan Howarth's conclusions.

¹⁰⁰ ANET brief by Richard Marks, D.C. office of Houston's Vinson & Elkins.

¹⁰¹ Judge Arnold argued that "a governmentally owned and controlled television station may not exclude a candidate, legally qualified under state law, from a debate organized by it on such a subjective ground as viability. To uphold such a defense would, in our view, place too much faith in the government." *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996).

¹⁰² *Forbes* brief.

¹⁰³ *United States v. Associated Press*, 52 F.Supp. 362 (S.D.N.Y. 1943).

¹⁰⁴ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *26-27 (1998). The court cited the number of candidates on some state ballots in the preceding presidential election.

¹⁰⁵ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *27 (1998).

¹⁰⁶ This argument shows little respect for the ability of candidates to be both clear and brief, and it shows little respect for the ability of voters to keep track of more than a few (two?) candidates. Of course, an alternative to reducing the amount of time to each candidate to 20 rather than 30 minutes, would be to lengthen the debate to 1 ½ hours. That would be an effective use of editorial discretion.

¹⁰⁷ In the 1992 election, George Bush, William Clinton, and Ross Perot debated.

¹⁰⁸ Although one of those debates (New Hampshire in 1984(?)) resulted in Ronald Reagan asserting his freedom to use the microphone.

¹⁰⁹ Note that just as anyone can solicit write-in votes, anyone can still get themselves a soapbox and speak in the public square.

¹¹⁰ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *14 (1998).

¹¹¹ Interestingly, nowhere was the argument cast as one of freedom of the press.

¹¹² *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *16 (1998).

¹¹³ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *17 (1998).

¹¹⁴ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *35 (1998) (Stevens, J., dissenting).

¹¹⁵ Many stations would be affected. Two-thirds of the nation's 350 public broadcast stations are licensed to state or local governments. N.Y. TIMES, 09 October 1997, at A28.

¹¹⁶ Justice Department brief.

¹¹⁷ "There is no obvious limiting principle that would afford minor candidates a constitutional right of access to televised debates but not, for example, to evening news broadcasts featuring interviews with the major candidates." We may then slide "to grant rights of television access not just to uninvited candidates, but to anyone with a view about a matter of public controversy." Justice Department brief.

¹¹⁸ Dellinger compared a candidate debate to an "academic lecture series sponsored by state universities." Justice Department brief. Lawrence G. Wallace extended the argument to the implications for art exhibits at state-run museums. He also questioned whether a composer would be entitled to equal time after a public broadcast of the Metropolitan Opera. N.Y. TIMES, 09 October 1997, at A28.

¹¹⁹ *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996).

¹²⁰ It seems that the Eighth Circuit had no problem with public broadcasts of private events, for example, a candidates debate sponsored by the League of Women Voters. But why shouldn't it? Isn't the result, that the same candidates get to speak and the same candidates don't just the same? How is the distancing not like money laundering?

¹²¹ *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990).

¹²² "In its discussion of the law, the Court understates the constitutional importance of the distinction between state ownership and private ownership of broadcast facilities." *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *31 (1998) (Stevens, J., dissenting).

¹²³ Dissent by Justice Stevens, with whom Justice Souter and Justice Ginsburg join, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *30-50 (1998).

¹²⁴ Stevens dissents from the "discussion of the facts" before he dissents from the "discussion of the law." Dissent, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *31 (1998) (Stevens, J., dissenting).

¹²⁵ "The Court has decided that a state-owned television network has no 'constitutional obligation to allow every candidate access to' political debates that it sponsors'... I do not challenge that decision." *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *30 (1998) (Stevens, J., dissenting).

¹²⁶ The dissent notes that Forbes was not considered by AETC staff "a serious candidate as determined by the voters of Arkansas," Record, Letter to Carole Adornetto from Amy Oliver Barnes dated June 19, 1992, attached as Exh. 2 to Affidavit of Amy Oliver Barnes. The dissent goes on to make a great deal of the fact that he had "been a serious contender for the Republican nomination for Lieutenant Governor in both 1986 and, especially, in 1990 when he received 46.88% of the statewide vote in a three-way primary and received a majority vote in 15 of the 16 Third Congressional District counties. *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *32 (1998) (Stevens, J., dissenting). Since the margin Republican winner's victory in the 1992 Third Congressional District election was only 3.02%, the dissent feels that exclusion of Forbes from the debate "may have determined the outcome." *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *33 (1998) (Stevens, J., dissenting). This suggests that if Forbes did not have quite so strong a track record or if the race had not been so close, he would not have had a constitutional right to participate in the debate. It seems clear that most independent candidates do not have Forbes's political track record nor are most races so close. Therefore, under the dissent's analysis, most independent candidates would not have Forbes's constitutional rights. Furthermore, how is a broadcaster to predict how close a race will be months before it is run? This concern might result in the participation of more candidates in races in which the result is less certain.

¹²⁷ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *35 (1998) (Stevens, J., dissenting).

¹²⁸ *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 505 (8th Cir. 1996).

¹²⁹ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *35 (1998) (Stevens, J., dissenting).

¹³⁰ For example, a dissent argument in favor of Forbes participating in the debate is that he raised more money than another, majority party, candidate who was invited. *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1998 U.S. LEXIS 3102, *34 (1998) (Stevens, J., dissenting).

¹³¹ *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

COMMERCE VIA THE INTERNET: THE FUTURE OF DOING BUSINESS

by

Reginia Judge*

I. Introduction

The Internet has revolutionized the way business is conducted, and therefore it has become an invaluable tool of commerce. It provides for the convenience of purchasing goods at home and, therefore, allows customers to save valuable time and money. Consumers can easily bid on merchandise through on-line auctions, perform price comparisons, and even print postage. They also have the ability to engage in financial transactions and trade stock. Because of the World Wide Web, merchants have been able to establish business without storefronts and service customers throughout the country and around the world. 58 million people in the United States and Canada used the Internet in 1997, a 14% increase from 1996.¹ Ten million of those users purchased goods and services on-line.² Retailers, such as Amazon.com, reported revenues at an estimated 1.4 billion dollars in 1999 from business-to-consumer sales.³ According to a recent report prepared by Penn State's Smeal College of Business Administration, U.S. Business-to-Business sales on the Internet are expected to reach \$183 billion dollars in 2001.⁴ This lucrative method of commerce has allowed business organizations to reap overwhelming profits.

Although many consumers are utilizing the Internet to make purchases and obtain information, there are still skeptics who have not ventured into cyberspace to take advantage of the services available. Often, concerns are focused on the protection of the right of privacy.⁵ A 1998 poll published in *Business Week* indicated that 61% of those who do not use the Internet would be more likely to do so if they thought their personal information would be protected.⁶ This article shall address the issues raised by the advent of electronic commerce such as privacy, security and consumer confidence. Also discussed will be the safeguards that can be utilized to address these concerns.

II. CONSUMER CONCERNS

A. CONFIDENTIALITY & SECURITY

The protection of one's privacy is a priority to those persons purchasing goods via the Net. The fear of transacting business over the Internet stems from the concern over the use and distribution of personal information that is often required to utilize some web sites. Moreover, the threat of security breaks when banking transactions and purchases are conducted electronically fosters the need for privacy.⁷ Many

* Assistant Professor of Legal Studies, Montclair State University, Montclair, New Jersey